Supreme Court of the United States

IN THE

OCTOBER TERM, 1959

No. 36

TWO GUYS FROM HARRISON ALLENTOWN, INC.,

Appellant,

vs.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant, and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,

Appellees.

ON APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE COURT SITTING IN THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U. S. C. SEC. 2281 ET SEQ.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE PRIOR TO CONSIDERATION OF JURISDICTIONAL STATEMENT FILED WITH CONSENT OF THE PARTIES UNDER RULE 27 (9) b).

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 699.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant.

vs.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant, and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,
Appellees.

ARGUMENT OF AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE.

The American Civil Liberties Union appears *amicus* with consent of the parties in support of the position advanced by the appellant, "Two Guys from Harrison-Allentown, Inc.", having appeared in the same position in the courts below. This brief seeks to avoid mere reiteration of appellant's presentation.

The American Civil Liberties Union is a non-profit, nonpartisan organization dedicated to the protection and advancement of the rights guaranteed in the Constitution of the United States and particularly in the Bill of Rights.

One of the most important rights granted by the United States constitution is that relating to the prohibition of the

establishment of religion and the freedom of religion under the First Amendment. In relation to the Sunday laws restricting the right of persons to labor on Sunday and to sell legitimate merchandise on Sunday, state legislatures have declared that these laws do not purport to be laws relating to religion but are really laws designed to protect the health and welfare of the population by limiting their right to labor to six days per week and restricting the sale of merchandise to six days per week, and are alleged to be constitutional under the police power. This is patently a subterfuge to hide the real purpose of the legislation, namely,—to set aside Sunday as the Christian Sabbath so as to insure its religious observance for the majority of the American population, *Willis, Constitutional Law* (1936), p. 749. We, however, will accept the premise of the legislatures and proceed to attack the constitutional validity of the Sunday Laws on the ground that although the police power does enable a legislature to require each person to desist from work for at least one day per week and that each business refrain from selling merchandise for at least one day per week, the police power does not permit the legislature to designate a particular day of the week. In other words, a statute may limit the freedom of an individual to contract to sell and to sell his labor for seven days a week but it may not deprive the individual of his right himself to choose the day on which he will refrain from labor. A statute may not limit the freedom of a person, individual or corporate, to sell merchandise seven days per week under the guise of requiring that business to remain idle at least one day per week.

At common law all business can be transacted on Sunday, *Commonwealth v. Foster*, 28 Pa. Superior Ct. 400 (1905); *Commonwealth v. Teaman*, 1 Philadelphia 460, 461 (1853). Statutes are required to make Sunday business illegal, provided there is no constitutional inhibition. The Supreme Court of the United States has upheld a law making it unlawful to run a freight train on Sunday in *Hennington v. State of Georgia*, 163 U. S. 299 (1896), stating at page 305:

> "Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regular recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require the cessation of labor, and to name the day of rest."

It is the contention of the American Civil Liberties Union that while the legislature may require a day of rest in seven, it is not within the competency of the legislature to fix the day of rest, and the Supreme Court of the United States as constituted in 1896 was in error when it so declared without demonstrating by authority, logic and reason that the legislature possessed the right to designate a specific day for rest and not allow the individual to determine for himself the day upon which he wishes to desist from labor, a day which best accords with his religious convictions or his economic or social desires.

The law is clear that the legislature under the police power may require each person to desist from labor one day in seven. This restriction constitutes a limitation upon the liberty of the individual which is justified by the community's need to protect the health of its constituents even though involuntarily imposed. The real question is whether the State may further limit the individual's liberty and freedom by withdrawing from him the freedom to choose the day. Is there a necessity to specify a day? If the purpose is to assure a day of rest in seven, then there is no need to require a particular day since the object is to provide the twenty-four hours of rest regardless of the day. The only justification for legislative choice of one day applying to all is the difficulty of enforcement. Thus in *State of Ohio v. Ullner*, 143 N. E. 2d 849, 105 Oh. App. 546 (1957), at 851-2:

"But it is said that while requiring the observance of one day out of seven as a day of rest is a valid exercise of the police power, that power does not authorize the fixing of a specific day of the week as a day of rest. . . .

"If designating a specific week day as the day of rest is beyond the power of the legislature, it must be for some other reason. We do not think that the legislature is required to assign a reason for fixing a specific day, rather than leaving it to individual choice. We think valid reasons could be stated. In passing legislation, it is a proper object to consider the ease or difficulty of enforcement. Now certainly the power to enforce the observance of a specific day of rest would be much easier than to enforce a day of rest selected by the individual. It would seem that the latter would not only be difficult but in fact impossible to enforce."

The fact that the requirement of one day of rest in seven with the individual choosing the day would cause inconvenience in enforcement is not sufficient reason to take the right of choice of day of rest from the individual. Thus, in *Commonwealth v. Tagola*, 89 Pittsburgh Law Journal 187 (Penna. 1941), an ordinance limited the hours a barber shop could keep open. The Court states:

"The contention that adequate inspection will be impossible if the shops are open at all hours is manifestly untenable; perhaps adequate inspection may require either a larger force of inspectors or a division of the force. These, however, are mere matters of convenience for the city They do not constitute a standard for determination and afford no basis for an otherwise unwarranted interference with the use and control of the property of the complainants."

A study of the "one day of rest in seven" laws will demonstrate conclusively that they are not difficult of enforce-

ment. Five states (Arizona, California, Oregon, Wisconsin and Wyoming) have moved in the direction of adopting enforceable one day of rest in seven laws after repealing their Sunday laws, see *Sunday Laws*—25 Southern California Law Review 131, 134 (1952). New York has such a law in addition to the Sunday law for certain industries, see *People v. Klinck Packing Company*, 214 N. Y. 121, 108 N. E. 278 (1915). The law if effectively enforced by requiring the posting of a list of employes required to work on Sunday and designating other particular days of rest for each and filing a copy with the Commissioner of Labor, filing a copy of every change, and further keeping records of hours worked each day by each employe. Illinois, Massachusetts, New Hampshire and Connecticut have similar provisions. Similar methods of enforcement are applicable to cases of exemption for those who observe other Sabbaths. In such cases, the shopkeeper must close his place of business on Saturday, give notice to the local authorities of his intention to do so and post notice of this practice in the shop, see *Skottowe, the Law Relating to Sunday* (London, 1936).

There are many provisions governing hours of work of women and minors which are enforceable adequately through the keeping and inspection of records. A survey of all the laws relating to working hours, one day of rest in seven laws and exemptions for observers of other days of rest laws, indicates that enforcement of such laws to insure proper rest for the individuals concerned can be effective without requiring that the specific day of Sunday be set aside as a universal day of rest.

If, therefore, the alleged legislative purpose is to assure to each individual at least one day of rest in seven, there can be no doubt that this goal can be effectively achieved without the necessity of designating a particular day and withdrawing this right of choice from the individual. Consequently there is now a new approach to the problem of

an enforced day of rest, "a new departure which will secure permissive and protected rest to each employed person for one day in the week, the day being determined by the employed person and the employer, *A. H. Lewis, Sunday Legislation* (1902), p. VIII.

Our laws generally are directed not to the right of an owner to sell his goods, but to the manner in which he may sell them, *Commonwealth v. Gardner*, 133 Pa. 284 (1890). It is a false idea that the time of an act could have anything to do with its moral nature, all other things being equal, *Ringgold, the Law of Sunday* (1891), p. 73. It is unthinkable that there is a power in the State, absent as to secular days, to limit a right solely on Sunday, *Brattle Films v. Commissioner of Public Safety*, 333 Mass. 58, 127 N. E. 2d 891 (1956). The legislature may not limit the time when an otherwise legitimate sale may be made, but may restrict the manner in which the sale is made in order to protect the community.

"The valid exercise of the state's police power requires that there be a substantial nexus between the end to be achieved and the legislation enacted for that purpose, accomplished without interference with the fundamental rights guaranteed to the individual," *Sunday Laws*, supra at page 134. If alternative methods are available for attaining a desired end, the fact that one entails a greater deprivation than the other is a factor for consideration in the validity of the legislative choice, *Dowling, Cases on Constitutional Law* (4th ed.) p. 771, citing *Weaver v. Palmer Bros. Co.*, 270 U. S. 402 (1926); see *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951). If a legislative goal can be achieved at a lower price in terms of limitation of rights of individuals that choice must be made which least interferes with these rights, (*Note*) *Consideration of Facts in Due Process Cases*, 30 Columbia Law Review 360, 362 (1930).

Thus if the desired legislative purpose is to provide compulsorily one day of rest in seven, then the legislature in

choosing a technique to accomplish this purpose, having a choice of two methods of reaching its goal, must choose that one which least interferes with the constitutional rights of the individual consistent with effective enforcement. For if effective enforcement is absent, the goal is not achieved. If, therefore, the legislative purpose is to assure a day of rest each week, it is sufficient for the legislature to declare that no one may work more than six days a week, and to permit the individuals concerned, by contract, to determine which day of the week shall constitute the day of rest. A lengthy brief surveying the statutes relating to the enforcement of legislation providing for one day of rest in seven, for exemptions from the Sunday law for those observing other days of rest, and for hours of work for women and children, will demonstrate that techniques of enforcement are available in order to accomplish the desired goal, namely, the substantial certainty that the population will be assured under law one day of rest in seven so that the need to provide rest, recreation, worship and physical revival will be provided.

The old Supreme Court cases upholding Sunday laws based on the police power of the states to pick Sunday as a universal day of rest should be overruled as has been evidenced in recent Supreme Court decisions in matters of great public concern and changed conditions, especially since these cases indicate a failure to consider thoroughly the constitutional question of the right to choose a specific day of rest. The automobile age, the distance of shopping centers from concentrated areas of population, the demands of minorities to observe their own days of rest for purposes of religious worship, the need of the public for manifold forms of recreation and entertainment on their days of rest: all these call upon the judicial arm of our government to protect the right of all men to choose their form of rest and worship and also the time of rest and worship so long as it does not interfere with the right of others to enjoy

their days of rest and worship in the manner and at the time they see fit.

Respectfully submitted,

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